No. 15,881

United States Court of Appeals

For the Ninth Circuit

Hugh Bryson,
Appellant,
vs.
United States of America,
Appellee.

Appeal from the United States District Court for the Northern District of California, Southern Division.

APPELLANT'S OPENING BRIEF.

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Appeal from the United States District Court for the Northern District of California, Southern Division.

APPELLANT'S OPENING BRIEF.

These are appeals (TR 23, 31) from (1) an order denying appellant's motion to reduce or modify his sentence; and (2) the failure and refusal of the court below to rule upon a petition for reconsideration of said denial.

JURISDICTIONAL STATEMENT.

The jurisdiction of the District Court over the offense involved is conferred by 18 USCA 1001; its jurisdiction to reduce or modify the sentence imposed is conferred by Rule 35, Federal Rules of Criminal Procedure. The jurisdiction of this Court over this appeal is conferred by 28 USCA 1291 and 1294(1).

APPLICABLE CONSTITUTIONAL PROVISIONS, AND RULES.

The Eighth Amendment to the Constitution of the United States reads as follows:

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."

Rule 35, Federal Rules of Criminal Procedure, reads as follows:

> "The court may correct an illegal sentence at any time. The court may reduce a sentence within 60 days after sentence is imposed, or within 60 days after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or within 60 days after receipt of an order of the Supreme Court denying an application for a writ of certiorari."

STATEMENT OF THE CASE.

Appellant was charged in an indictment in three counts with having violated 18 USCA 1001 by having falsely sworn in 1951 that (1) he was not a *member* of the Communist Party; (2) he was not *affiliated* with that party; and (3) he did not *support an organization which advocated violent overthrow of government*. Prior to trial the Government voluntarily dismissed the third count. A jury acquitted appellant of the first count, thereby finding that he had not been a member of the Communist Party in 1951. It convicted him on the second count, thereby finding that in 1951 he had been affiliated with that party.

The trial judge, William C. Mathes of the Southern District of California, analogizing the offense to a violation of the Smith Act (Tr. June 14, 1955, p. 16, in file No. 14859 in the files and records of this Court), imposed the maximum sentence upon appellant.[1]

Upon appeal, the conviction was affirmed here (238 F.2d 657). Certiorari was denied (355 U.S. 817). When the mandate of this Court was filed in the court below, appellant moved for an order staying the execution of his sentence so that he might prepare and file a motion for relief under Rule 35 of the Federal Rules of Criminal Procedure. This motion was granted by the judge then sitting in the Master Calendar Department below, Honorable George B. Harris. Furthermore, Judge Harris directed the Court's Probation Officer to prepare and file a supplemental probation report in connection with the motion which was to be made under Rule 35 (TR 3-4).

Such a motion (TR 4) was made, supported by an affidavit of appellant (TR 5-22). Prior to the hearing of the motion and at the suggestion of the Probation Officer, appellant had procured from many citizens

[1]The same trial judge presided in the Los Angeles Smith Act cases in which judgments of conviction were reversed by the Supreme Court (*Yates v. United States,* 354 US 298). This judge's position, *vis-a-vis* alleged Smith Act violators is clearly spelled out by his persistent refusal to grant reasonable bail despite the orders of the Appellate Courts. See *Stack v. Boyle,* 192 F.2d 56; *Stack v. Boyle,* 342 US 1; *United States v. Schneiderman, et al.,* 102 F.Supp. 52; *United States v. Spector,* 102 F.Supp. 75; *Stack v. United States,* 192 F.2d 875; *Spector v. United States,* 193 F.2d 1002.

in the community, letters attesting to his good character, which letters were submitted to Judge Mathes.[2]

At the opening of the court session a probation report was submitted to the court and to all counsel. At the outset of the argument on the Rule 35 motion, Judge Mathes said that he had considered the motion papers, the appellant's affidavit, the many letters received. Presumably the judge had also considered, although he did not so state, the Probation Officer's report.

On the argument the Government adopted "a neutral position on the motion" (TR 23).

At the conclusion of the proceedings, Judge Mathes denied the motion, stating:

> "These are very difficult matters, a difficult one especially because of the type of person involved. The autobiographical affidavit that the defendant filed explains in rather eloquent case history terms the monstrous economic conditions that existed during the depression years in this country which drove many fine young people into the Communist Party. I presided at a trial of fourteen Communists down in Los Angeles, and at the time of sentence heard each one of them tell his life history somewhat in the same

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[2]Letters of similar import had been submitted to the Probation Officer at the time sentence was originally passed. A panel of this Court commented as follows, with respect to this matter, at a time when appellant's application for bail pending appeal was before it:

> "Coupled with this there are of record in the files of this action statements of a large number of responsible citizens of California to the effect that Bryson was a reliable and dependable person . . ." (223 F.2d at 777).

> vein as the defendant, Bryson, and it was surprising how many of those confessed to Communism, those who were born in this country, how many of them went into the Communist Party and embraced the philosophy during dismal years of 1931, say, to 1934. There used to be an expression I heard years ago. We used to hear it quite frequently. I do not know the source of it, but something to the effect that if a college-trained man at 20 was not a Socialist or not inclined to be a Socialist, something was probably wrong with his heart. If at 40 he was still inclined to be a Socialist, something was probably wrong with his head.
>
> "I wish I could believe Mr. Bryson is no longer a Communist. I wish I could believe he was dedicated as he apparently once was to Communism—I wish I could believe he were dedicated today to defend our system which I am sworn to uphold. I find nowhere in his affidavit any renunciation or denunciation of Communism or Communist doctrine. In short, gentlemen, I can't bring myself to grant the motion. The motion will be denied and the defendant will be committed to the custody of the Marshal to serve the sentence. His bail will be exonerated." (Tr. January 3, 1958, pp. 16-17.)[3]

Appellant filed a notice of appeal (TR 23) from the order denying the motion to reduce or modify the sentence.

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[3]The transcript of the proceedings of January 3, 1958, has been lodged with the Clerk of this Court, but because it consists primarily of argument of counsel, it has not been included in the printed record.

Because of the observation made by Judge Mathes during the proceedings of January 3, 1958, as quoted above, and after appellant was incarcerated but during the sixty day period referred to in Rule 35, appellant filed a petition for reconsideration (TR 27) together with a supporting sworn statement (TR 28-30). Judge Mathes declined to act upon said petition within the sixty day period. Immediately thereafter, appellant filed a further notice of appeal (TR 31-32).

Appellant specified (TR 24-25) among his points on appeal, the following:

> 1. The court erred in denying appellant's motion for modification or reduction of sentence.
>
> 2. The court failed to exercise the discretion required by law to be exercised, in denying appellant's motion for reduction or modification of sentence.
>
> 3. The court committed an arbitrary abuse of discretion in denying appellant's motion for reduction or modification of sentence.
>
> 4. The court applied unlawful and improper standards in denying appellant's motion for reduction or modification of sentence.
>
> 5. The order of the court denying said motion for reduction or modification of sentence is not supported by law or by the record of said cause.

In this Court appellant has added to the foregoing the following additional points on appeal:

> "Appellant asserts that the sentence below was imposed in violation of the laws and Constitution

of the United States and that it constituted and constitutes cruel and unusual punishment, contrary to the provisions of the Eighth Amendment to the Constitution of the United States." (TR 36.)

ARGUMENT.

I.

THE IMPOSITION OF THE MAXIMUM PENALTY IS, ON THE FACTS OF THIS CASE, CRUEL AND UNUSUAL PUNISHMENT, IN VIOLATION OF THE PROHIBITIONS OF THE EIGHTH AMENDMENT.

Appellant had originally been charged with three counts of making false statements with respect to (1) his alleged personal support of violent overthrow of government; (2) his membership in the Communist Party; and (3) his affiliation with that organization. The government withdrew the first and most serious of these charges, and the jury acquitted appellant of the second and next most serious. He therefore stood convicted of making a false statement with respect to *affiliation,* which has been called a status of "dubious scope" (Frankfurter, J., *American Communications Association v. Douds,* 339 U.S. 382).[4]

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[4]Other judges have had equal difficulty with the term:

Judge Learned Hand, in *Tolsky v. Wilson,* Southern District of New York, cited in *Bridges v. Wixon,* 154 F.2d 927, 941, n. 1, said: "As to affiliation the case is not so clear, and depends on how one defines that word."

Judge Chase, in *United States v. Reimer,* 79 F.2d 315, 317, said that definition of "affiliation" "is . . . impossible . . ."

Judge Major, in *Inland Steel v. National Labor Relations Board,* 170 F.2d 247, 262, said of "affiliation": "Its meaning would be quite beyond the reach of the ordinary citizen."

We argue here, that the imposition of the maximum statutory penalty for what was at most a minimal and technical violation of the law, constitutes cruel and unusual punishment.

The constitutional term has not often been defined, but it clearly embraces a punishment which is disproportionate to the offense proved. *Weems v. United States,* 217 U.S. 349, 368. In the last cited case, the Supreme Court quoted with evident approval from *McDonald v. Commonwealth,* 173 Mass. 322, the observation that "punishment in the state prison for a long term of years might be so disproportionate to the offense as to constitute cruel and unusual punishment." In the *Weems* case the Court also referred, again with approval, to the earlier statement of Mr. Justice Field in *O'Neil v. Vermont,* 144 U.S. 323, that the prohibition of the Eighth Amendment "was directed not only against punishment which inflicted torture, 'but against all punishments which, by their excessive length or severity, are greatly disproportionate to the offense charged.' "

In the *Weems* case itself, an extended prison sentence for the crime of falsifying a public document was set aside as violative of the constitutional prohibition. The underlying reasoning of *Weems* was recently reiterated by the Supreme Court in *Trop v. Dulles,* 355 U.S. ...., 2 L.ed.2d 630, at 642, where the Court said that the Eighth Amendment required punishment to conform to "principles of civilized treatment" and to be imposed "within the limits of civilized standards" (355 U.S. ...., 2 L.ed.2d 630 at 642).

In determining whether or not these requirements of the Eighth Amendment were met, the Court indicated that punishment would be examined to determine whether it had been imposed "depending upon the enormity of the crime" (355 U.S. ...., 2 L.ed.2d 630, at 642).

It is clear from the foregoing that there is a relationship, required by the Eighth Amendment, between the punishment which is imposed and the seriousness of the offense. It is submitted that in this case, the punishment imposed far exceeded the seriousness of the offense.

Here, Congress fixed a maximum punishment of five years imprisonment and $10,000 fine for false swearing respecting a personal advocacy of violent overthrow of government, membership in a proscribed organization, and affiliation with that organization. The degrees and grades of severity of the three offenses made it clear that there is to be a degree and gradation of punishment. If the maximum punishment which can be imposed for falsely swearing that one does not personally advocate or support the overthrow of government is five years in prison and a $10,000 fine, then it is cruel and unusual to impose that same punishment on a person who is not guilty of that offense, but only guilty of the much less serious offense of falsely stating that he is not *affiliated* with a specified organization. It is not to be supposed that the same punishment should automatically apply for a violation of the obviously much less serious offense, which is not only harder for judges to define, but

as well for laymen to understand, of false swearing concerning "affiliation" with a proscribed organization.[5]

While the constitutional objections as to the vagueness of the term have been rejected in this case, the factors upon which they were based are hardly irrelevant in the assessment of an appropriate sentence. Nor can the jury's own lack of clarity with respect to the meaning of the term be disregarded at the sentencing stage of the proceedings. And it is particularly important to recall that the man upon whom sentence was imposed here, was acquitted of Communist Party membership—and a charge that he supported an organization advocating violent overthrow of government, was abandoned by the prosecution before trial.

To impose the maximum possible sentence both as to imprisonment and fine on this record is to impose a

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[5]The Supreme Court has frequently struck down judgments based on "affiliation" in the presence of a variety of extenuating considerations. Thus, in *Bridges v. Wixon,* 326 U.S. 135, deportation for "affiliation" with the Communist Party was held improper due to an absence of proof that the alien adhered to *proscribed objectives* of the organization, as distinguished from mere cooperation with it in lawful activities (at pp. 143-144). In *Rowoldt v. Perfetto,* 355 U.S. ...., 2 L.ed.2d 140, deportation for "affiliation" was again held improper, for failure to prove a "meaningful association" not wholly devoid of "political implications". And in *Schware v. Board of Bar Examiners,* 353 U.S. 232, New Mexico's refusal to admit to the bar of that state a former Communist Party member, was disapproved with a reminder, "Assuming that some members of the Communist Party during the period from 1932 to 1940 had illegal aims and engaged in illegal activities, it cannot automatically be inferred that all members shared their evil purposes or participated in their illegal conduct." (At p. 246.)

cruel and unusual punishment, because that punishment is disproportionate to the offense.

II.

THE TRIAL COURT APPLIED IMPROPER STANDARDS IN DENYING THE MOTION TO REDUCE OR MODIFY SENTENCE, AND HIS JUDGMENT MUST THEREFORE BE REVERSED.

The trial judge apparently imposed the maximum sentence upon appellant because he did not believe that appellant was "dedicated" to a "system" which the judge was sworn to uphold. The judge was reenforced in his conclusion that the maximum sentence should be imposed because he did not find in appellant's supporting affidavit a "renunciation or denunciation" of Communist doctrine (see, *supra,* p. 5).

It is submitted that such criteria are improper criteria to be applied in the imposition of sentence, and that in the enforcement of the penal laws of the United States, a defendant is not to be visited with a harsher sentence than might otherwise be the case because of the trial judge's views of the defendant's politics.

Furthermore, the trial judge was under a substantial misapprehension as to what the record shows. The affidavit of appellant (TR 5-22) eloquently establishes the change which had taken place in applicant's activities and thinking from the time he first stood before the court for sentencing. It would serve no useful purpose to quote excerpts from this affidavit in this brief at this point. Appellant commends a care-

ful reading of the affidavit to the members of this Court and earnestly requests that they give it the full consideration to which it is entitled.

Because of the observation made by the trial judge, and in order to dispel any lingering doubts which might have remained in his mind, appellant petitioned for reconsideration (TR 27) and submitted a sworn statement in which he categorically said, "I am not in favor of Communism; I am against it" (TR 28). Yet the trial judge refused to act on this petition.

The foregoing demonstrates two points: first, that the trial judge improperly applied standards which ought not to have been taken into consideration in the imposition of sentence; and second, that he made certain assumptions—*e.g.*, that appellant had not "renounced" Communism—which were contrary to and not supported by the record. Either of these two errors requires a reversal of the judgment and a resentencing of appellant.

It is the law that when a trial judge fails to apply proper legal standards, his judgment even though otherwise correct, must be reversed. *Takehara v. Dulles,* 205 F.2d 560 (9 Cir.); *Mar Gong v. Brownell,* 209 F.2d 448 (9 Cir.); *Wilson v. United States,* 250 F.2d 312 (9 Cir.).

In the *Mar Gong* case, a judgment was reversed because in part it appeared that the Court's findings in the pending case "are based in part upon circumstances shown in . . . other cases" (209 F.2d, at 450).

In other words, in *Mar Gong,* the trial judge imported into the proceedings before him, general attitudes which he had developed during the course of the trial of other similar cases. Here, it is obvious that Judge Mathes imported into the *Bryson* case, attitudes which he had developed during the course of the extended Smith Act trial in Los Angeles. As a matter of fact, the judge's observations at the time of the denial of the motion for reduction or modification of sentence are explicit to this effect (see *supra,* pp. 4-5).

In *Wilson v. United States, supra,* a judgment was reversed because, although the result reached by the trial Court might have been justifiable on other grounds, the trial judge had acted upon an erroneous legal premise. This Court said:

> "It is a fundamental precept of the administration of justice in federal courts that the accused must not only be guilty of the offense of which he is charged and convicted, but that he be tried and convicted according to proper legal procedures and standards. In short, it is not enough that the accused be guilty; our system demands that he be found guilty in the right way." (250 F.2d, at 324.)

It cannot seriously be contended that this fundamental precept of criminal justice in the federal courts is limited to trial and conviction and has no application to the imposition of sentence. The reasons which impel the enforcement of such a rigid standard during the course of the trial are equally

applicable at the moment of sentence. It will not do to say that an accused must be fairly treated throughout the trial but may be arbitrarily and capriciously sentenced. This fact has been recognized in the decisions of the Supreme Court of the United States.

In *United States v. Daugherty,* 269 U.S. 360, the defendants were sentenced to three consecutive five-year terms after having been found guilty on each count of a three-count indictment. The Court of Appeals was of the view that there had been but one offense and construed the sentence as being only for a single five-year period. The government obtained certiorari and the Supreme Court agreed with its contention that there were three offenses and that the sentence imposed was in fact for three consecutive five-year periods. If the Court were not concerned with the sentence, that would have ended the matter. The Court of Appeals would have been reversed and the original (legally correct) sentence of the District Court reinstated. However, despite its affirmance of the District Court's judgment, the Supreme Court sent the case back for resentencing, saying:

> "We deem it proper to add that the sentence of fifteen years imposed upon respondents seems extremely harsh. Circumstances not disclosed by the record may justify it, but only extraordinary ones could do so.
>
> "The judgment of the Court of Appeals is reversed and the one entered by the District Court is affirmed. The cause will be remanded to the latter court for further proceedings in conformity with this opinion." (269 U.S., at 364.)

In *Townsend v. Burke,* 334 U.S. 736, the Supreme Court reversed a sentence even though it affirmed the judgment. The sentence was reversed because it had been entered by the trial judge on the basis of certain assumptions of fact about the defendant which were not true. The same result obtained in *Keenan v. Burke,* 342 U.S. 881.

In the case at bar, as we have shown, Judge Mathes made certain assumptions about the appellant which were not true and were unsupported by the record. On the authority of the *Townsend* and *Keenan* cases, the sentence based upon those assumptions must be vacated.

Vetterli v. United States, 198 F.2d 291, in this Circuit, is a most illuminating case on the point here under consideration. There, the defendant had been convicted of perjury following his testimony before a Grand Jury in Los Angeles relating to espionage activities. On appeal, this Court (Healy, Orr and Pope, JJ.) in an opinion by Judge Orr, rejected appellant's contention that his sentence was invalid because its determination by the trial judge rested in part upon an observation, adverse to the defendant, relating to his failure to testify in his own behalf. The Court said:

> "Appellant challenges the validity of the sentence imposed because of certain remarks made by the trial court at the time of pronouncement. The sentence imposed was entirely within the limits fixed by law and thus was within the discretion of the Court, and we are therefore in no position to disturb it." (198 F.2d, at 294.)

The Court cited in support of its position *Kawakita v. United States,* 190 F.2d 506, affirmed 343 U.S. 717.[6]

When the *Vetterli* case got to the Supreme Court of the United States, certiorari was granted and the following *per curiam* order was entered:

> "*Per Curiam:* The motion for leave to proceed in forma pauperis is granted and the petition for writ of certiorari is granted. The judgment of the Court of Appeals is vacated and the case is remanded to the District Court for resentencing without taking into consideration defendant's failure to testify." (344 U.S., at 872.)

We think that the lesson of the *Vetterli* case is crystal clear: When a trial judge in imposing sentence takes into consideration matters which as a matter of law he ought not to, then an appellate court not only may but should vacate the sentence and remand the case for re-sentencing which will be free of legal error.

Indeed, an appellate court has the power and perhaps even the duty of vacating and remanding the cause for re-sentencing before a different judge. In *Calvaresi v. United States,* 216 F.2d 891 (10 Cir.), the defendants were convicted of conspiring to influence and bribe jurors, of influencing and bribing

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[6] *Kawakita* does not hold that there are no circumstances in which a reviewing court may not examine into the question of sentence. What the Court said in *Kawakita* was this:

> "Whether a sentence may be so severe and the offense so trivial that an appellate court should set it aside is a question we need not reach. The flagrant and persistent acts of petitioner gave the trial judge such a leeway in reaching a decision on the sentence that we would not be warranted in interfering." (343 U.S., at 745.)

jurors, and the contempt of court. Before the trial they filed affidavits of bias and prejudice and asked the trial judge to disqualify himself. This he refused to do. On appeal, they asserted, among other grounds in support of their contention that the trial judge was biased against them, the excessive sentences which he imposed upon them after conviction. Of this contention the Court of Appeals said:

> "While the sentences imposed are very severe, they are in every instance within the legal maximum provided by the statute. It cannot be said that standing alone the imposition of a sentence which the court had lawful authority to impose was bias and prejudice." (216 F.2d, at 900.)

When the *Calvaresi* case reached the Supreme Court, the following *per curiam* order was entered:

> "*Per Curiam:* In the interests of justice and in the exercise of the supervisory powers of this Court, certiorari is granted and the cases are severally reversed and remanded to the District Court for retrial before a different judge." (348 U.S., at 961.)

In *Nilva v. United States,* 352 U.S. 385, the defendant had been found guilty of three specifications of contempt of court. On certiorari the Supreme Court found only one of these specifications sustainable. This was enough to support the sentence. However, the Supreme Court said:

> "There remains a question as to the petitioner's general sentence. It was imposed following his conviction on each of the three original specifications. Although the government now undertakes

> to sustain but one of the convictions, it contends that that petitioner's sentence should be left as it is because it was within the trial court's allowable discretion. We believe, however, that the court should be given an opportunity to reconsider petitioner's sentence in view of the fact that his conviction now rests solely upon the third specification." (352 U.S., at 396.)

To the same effect, see *Yasui v. United States,* 320 U.S. 115, 117; and *Husty v. United States,* 282 U.S. 694, 703.

Perhaps the latest expression of the Supreme Court's attitude in these matters is in *Yates v. United States,* 356 U.S. ...., 2 L.ed.2d 837. There as this Court will remember, the defendant had been found guilty by Judge Mathes of eleven separate instances of contempt while she was testifying before him as a defendant in a Smith Act case. After a long series of intermediate proceedings demonstrating once again the attitude of Judge Mathes with respect to defendants involved in cases of this kind (see the history recounted in the latest Supreme Court opinion, 356 U.S. ...., 2 L.ed.2d 837), the Supreme Court held that the defendant had committed only one, not eleven contempts *(Yates v. United States,* 355 U.S........., 2 L.ed.2d 95, 99), and remanded the case for re-sentencing. At this point we should note that the fact of the remand is in itself significant. Obviously the one contempt which was found to be legally valid was sufficient to sustain the sentence, as indeed the government argued. But because the sentencing procedure

is not immune from the requirements of due process (*Williams v. New York,* 337 U.S. 241, 262, n. 18), the sentence was vacated and the case was remanded for re-sentencing "in the light of this opinion" (355 U.S. ...., 2 L.ed.2d, at 103).

On the remand, Judge Mathes adhered to his original sentence and he was affirmed in this Court although the Court was of the view that the sentence was "severe" (*Yates v. United States,* 252 F.2d 568, 569). Despite the severity of the sentence, this Court found nothing different there from what obtains in every case "where the defendant thinks he was sentenced too heavily and has no other claim on which to attack his sentence" (252 F.2d, at 569). It therefore affirmed the judgment. The Supreme Court did not consider that the law was so inflexible. It recognized that the proper place for the reduction or modification of sentence was in the trial court, but took the view that where the trial court "appears not to have exercised its discretion . . . but in effect to have sought merely to justify the original sentence, this Court has no alternative but to exercise its supervisory power . . . by setting aside the sentence of the District Court" (*Yates v. United States,* 356 U.S. ...., 2 L.ed.2d, at 840.)

We submit that the record in this case demonstrates that the trial judge did not exercise his discretion here but, as in *Yates,* sought merely to justify his original sentence. The sentence therefore should be vacated, and the cause remanded for further proceedings.

III.

THE TRIAL JUDGE ABUSED HIS DISCRETION AND ACTED IN AN ARBITRARY AND CAPRICIOUS MANNER IN REFUSING TO REVOKE OR MODIFY THE SENTENCE.

Rule 35, Federal Rules of Criminal Procedure, provides that "the court may reduce a sentence" after affirmance on appeal. Obviously the purpose of the rule was to permit a trial judge to re-examine the situation after the appellate process with respect to the merits of the conviction had been terminated. The rule permits the trial judge to re-evaluate—if a re-evaluation is indicated—the situation, not as it existed at the time of the trial but as it exists (some times months and some times years later) at the time when the defendant is about to commence the service of his sentence. The rule must have had a purpose. Its purpose is obviously to permit the Court in a proper case to modify or to revoke a sentence, and even to impose probation.

Indeed, the rule should be read together with 18 USCA 3651, *et seq.*, which establish a probation system in the federal penal structure. Together, the rule and the probation law establish a policy on the part of Congress which trial judges are enjoined to follow. It has been recognized that in ruling upon motions for probation (which was what the motion under Rule 35 really was), trial Courts may not abuse their discretion or act arbitrarily or capriciously. *United States v. White,* 147 F.2d 603 (3 Cir.); *Manning v. United States,* 161 F.2d 827 (5 Cir.); *Kirsch v. United States,* 173 F.2d 652 (8 Cir.); *United States*

v. Cosentino, 191 F.2d 574 (7 Cir.); *Dodd v. United States,* 213 F.2d 854 (10 Cir.).

In the resolution of an issue such as was presented to Judge Mathes by the Rule 35 motion, a trial court is to be guided by a judicial discretion; it is not to be prompted by arbitrary or capricious motives.

> "The question, then, in the case of the revocation of probation, is not one of formal procedure either with respect to notice or specification of charges or a trial upon charges. The question is simply whether there has been an abuse of discretion and is to be determined in accordance with familiar principles governing the exercise of judicial discretion. That exercise implies conscientious judgment, not arbitrary action. *The Styria v. Morgan,* 186 U.S. 1, 9, 46 L.ed. 1027, 22 S.Ct. 731. It takes account of the law and the particular circumstances of the case and 'is directed by reason and conscience of the judge to a just result.' *Langnes v. Green,* 282 U.S. 531, 541, 75 L.ed. 520, 526, 51 S.Ct. 243. While probation is a matter of grace, the probationer is entitled to fair treatment, and is not to be made the victim of whim or caprice." (*Burns v. United States,* 287 U.S. 216, at 222-223.)

Here, Judge Mathes has indicated his failure to exercise such a judicial discretion by at least the following: (1) his analogizing to alleged Smith Act violations at the time of the original sentence; (2) his insistence that he could not reduce the sentence as requested in the Rule 35 motion because of his belief (contrary to the record) that appellant was still a Communist; and (3) his insistence that appel-

lant declare an adherence to an undefined "system" to which the judge conceives himself to be dedicated. Such criteria, we submit, are not the stuff of which judicial—as distinguished perhaps from executive (see *Bridges v. United States,* 184 F.2d 881, at 887)—decisions are to be made. Judge Mathes may harbor strong feelings against Communists and Communism —and the record of the Smith Act proceedings before him (see *supra,* pp. 4-5), indicates the extent of his feelings about such matters—but in the imposition of a criminal sentence he is required to act in a judicial capacity under our Constitution, and to exclude from his thinking all such extraneous considerations —especially in the case, as this record shows, of a non-Communist.

For the evidence, which is uncontroverted, shows that since 1947 Bryson has had no associations with Communists, that he deliberately stayed away from such associations, that he has had arguments and disagreements with persons reputed to be Communists, and has had no relations of any kind with them. It shows further that since at least 1954 he has embarked upon an entirely new and different kind of life from that which he followed earlier. It shows not only, as the government remarked in its memorandum, that he has worked hard and been good to his family, but it shows a complete change in the personality of appellant (TR 5-22).

Yet despite this uncontroverted evidence, Judge Mathes arbitrarily, capriciously and without any foundation whatsoever, simply stated that he refused

to believe it. Judge Mathes did not indicate, as did the judge in *Williams v. New York, supra,* that there was evidence outside the record which controverted the evidence submitted by Bryson. He simply arbitrarily refused to believe the uncontradicted evidence. More than that, he set up standards such as "renunciation or denunciation of Communism" and "dedication" to a "system" which he apparently required of appellant before he would exercise his discretion in favor of appellant. Like the judge in *Vetterli v. United States, supra,* he took into consideration matters which a judge ought not to consider in the imposition of sentence. Just as the *Vetterli* sentence was reversed because the judge had considered the defendant's invocation of the Fifth Amendment privilege against self-incrimination, so must this sentence be reversed because of Judge Mathes' consideration of matters totally extraneous to the issue before him.

As we have pointed out, because of the observations made by Judge Mathes at the time of his ruling on the motion to modify the sentence, Bryson filed a supplemental affidavit in which he unequivocally stated his position with respect to the issues to which Judge Mathes addressed himself. He prayed for a reconsideration of the ruling and requested an opportunity to be heard thereon. The judge did not grant him a hearing and simply ignored his subsequent petition.

The utilization by the trial judge of improper standards and his refusal to believe the uncontra-

dicted facts can only be characterized as such an abuse of discretion, as such arbitrary and capricious conduct, as to require review and reversal at the hands of this Court.

CONCLUSION.

In this case, a trial judge who quite obviously had strong feelings about Communists and Communism in the United States, has imposed the maximum sentence upon a defendant whom the government has apparently conceded did not support violent overthrow of government (by its dismissal of the third count of the indictment), whom the jury has acquitted of the charge of membership in the Communist Party, and whom the Court of Appeals has found to have been guilty of that dubious status, "affiliation", with that party back in 1951. The appellant in question has not for years been associated with Communists, nor sympathetic to Communist doctrine. His interests at the present time and for the past several years have revolved exclusively around his family and his work as a real estate salesman.

We suggest that the laws of the United States are sufficiently broad, flexible, and humanitarian to cope with the situation thus presented; they do not require that Hugh Bryson spend the next five full years in jail and be weighted down with the awesome burden of a $10,000 fine.[7] Indeed, to the contrary, our law

[7]Bryson was formerly an official of a trade union, and it is known that financial assistance has sometimes been forthcoming

will best be served by a determination of this Court that in view of this record, the order of Judge Mathes denying relief under Rule 35 be reversed, the sentence heretofore imposed be vacated, and the matter sent back for further proceedings before another judge.

Dated, San Francisco, California,
August 13, 1958.

Respectfully submitted,
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from a trade union with respect to the payment of fines of its leaders. At the time of the trial of this action, the union with which Bryson had formerly been connected, had become defunct. As the record shows, he has had no trade union association for many years.